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No. 82-275

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

TERRI ANN MIENER,
By and Through Her Next Friend and Parent
CLYDE J. MIENER,
Petitioner,

v.

STATE OF MISSOURI, et al.,
and
SPECIAL SCHOOL DISTRICT OF ST. LOUIS
COUNTY, MISSOURI, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Education For All Handicapped Children Act, 20 U.S.C. § 1401, *et seq.*, allows a remedy of money damages for a failure to provide an appropriate education to those handicapped children who fall within its scope.

2. Whether the petitioner's claim for compensatory educational services, in the form of a request that the State of Missouri provide educational services to the petitioner beyond the age which the state is legally obligated to offer, constitutes a claim for damages barred by the Eleventh Amendment to the United States Constitution.

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BRIEF IN OPPOSITION

Counter Statement of the Case

The petitioner herein, Terri Ann Miener, is a handicapped child within the meaning of the Education For All Handicapped Act, 20 U.S.C. § 1401, *et seq.*, (EAHCA). The respondents herein are various agencies and officials of Missouri state government and the St. Louis County Special School District and some of its officials. The complete listing of respondents is quite lengthy and is included in full in the petitioner's petition for writ of certiorari.

The petitioner was voluntarily admitted to the St. Louis State Hospital, a facility operated by the Missouri Department of Mental Health, in June of 1977. In 1979 the petitioner filed a complaint alleging that she had not been provided an appropriate education as required by the EAHCA and that this alleged deprivation also constituted a violation of § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). Petitioner also sought relief pursuant to 42 U.S.C. § 1983 and asserted a pendent tort claim for personal injuries as well. Petitioner's complaint sought declaratory, injunctive and monetary relief. The monetary relief requested for the alleged denial of petitioner's constitutional and statutory rights was $624,358. The injunctive relief requested not only sought equal access to programs and facilities at St. Louis State Hospital but also the provision of educational services beyond age 21 to overcome the effect of the alleged past denial of appropriate education. The petitioner's complaint appears as Addendix D of her petition.

In October, 1979, the District Court ordered the petitioner to pursue her administrative remedies under the EAHCA and the appropriate Missouri statutes. On January 25, 1980, the District Court dismissed petitioner's damage claims for alleged past deprivations asserted under the Rehabilitation Act and the EAHCA but refused to dismiss the enforcement claims which were asserted under those provisions. The grounds for the Court's dismissal was that no private cause of action for damages existed under these statutes. The District Court also dismissed the petitioner's claims under 42 U.S.C. § 1983. In addition to the petitioner's enforcement claims, the pendent tort claim and the claim for compensatory education remained in the case. See Appendix B of petitioner's petition.

In the course of the administrative proceedings, the parties eventually agreed upon a settlement of the enforcement claims. The settlement agreement which was approved by the District Court on April 23, 1980, provided that the petitioner would be placed in a private psychiatric facility and receive her educational services from a nearby school district. All parties agreed that this arrangement would provide the petitioner with an appropriate education and related services. The settlement agreement provided that the petitioner would dismiss all claims not previously dismissed by the Court with the exception of the compensatory education claim and the pendent tort claim.

On July 8, 1980, the state respondents filed a motion to dismiss the claim for compensatory education, asserting that this was in effect a claim for damages and that all damage claims had been previously dismissed by the Court in its order of January 25, 1980. On September 19, 1980, the District Court entered an order dismissing the petitioner's claim for compensatory education on the grounds that it was in fact a claim for damages which would be barred by the Eleventh Amendment to the United States Constitution. In view of the fact that there were no remaining federal claims, the District Court dismissed the pendent tort claim without prejudice. See Appendix C of petitioner's petition.

Petitioner then appealed to the United States Court of Appeals for the Eighth Circuit which issued its decision on February 4, 1982. The Court of Appeals agreed with the District Court that there was no cause of action for damages under the EAHCA and that the compensatory services sought by petitioner was a claim for damages which could not be asserted against the State of Missouri by virtue of the Eleventh Amendment. The opinion of the

Court of Appeals is included as Appendix A to the petitioner's petition for writ of certiorari. A motion for rehearing by the Special School District of St. Louis County and it officers was overruled on May 20, 1982. On July 12, 1982, the Special School District of St. Louis County and its officers filed their petition for writ of certiorari which has been docketed in this Court as No. 82-61. On or about August 18, 1982, the petitioner filed her own petition for writ of certiorari.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

The Court of Appeals below correctly determined that monetary damages is not an available form of relief under the Education For All Handicapped Children Act, 20 U.S.C. § 1401, *et seq.* (EAHCA), and there is no conflict between decisions of the Eighth and Seventh Circuit Courts of Appeal, as alleged by petitioner, as to the relief sought by the petitioner.

The United States Court of Appeals for the Eighth Circuit concluded that the District Court had properly dismissed the petitioner's claim for monetary damages arising under the EAHCA. *Miener* v. *State of Missouri*, 673 F.2d 969 (8th Cir. 1982). In holding that monetary damages were not an appropriate form of relief under that statute, the Eighth Circuit eschewed the form of analysis employed by this Court in *Cort* v. *Ash*, 422 U.S. 66 (1975), on the basis that since Congress had expressly created a cause of action under the EAHCA, the issue was not whether a cause of action could be implied, but whether monetary damages was intended by Congress to be an appropriate form of relief under the statute. The Seventh Circuit Court of Appeals took an identical approach in *Anderson* v. *Thompson*, 658 F.2d 1205 (7th Cir. 1981). The Eighth Circuit Court of Appeals adopted, in large measure, the reasoning and holding of the Seventh Circuit Court of Appeals in *Anderson*.

In *Anderson* the Seventh Circuit had held that the authorization to "grant such relief as the court determines as appropriate", appearing in 20 U.S.C. § 1415(e)(2) did not include an award of monetary damages. The court

concluded the § 1415(e)(2) was the culmination of a series of procedural safeguards which were aimed at insuring proper educational placements for handicapped children. The court held that in this context the term "appropriate" was restricted to injunctive relief. Although at the time of their opinions, neither the Eighth nor Seventh Circuit Courts of Appeals had the benefit of this Court's opinion in *Board of Education* v. *Rowley*, 50 U.S.L.W. 4925 (June 28, 1982), nothing in the *Rowley* opinion undermines the conclusions of the courts of appeal that damages are not "appropriate" under the EAHCA. In fact, even though the issue of whether monetary relief was available was not presented in *Rowley*, this Court's opinion therein evinces a similar philosophical approach to the EAHCA and is, therefore, supportive of the conclusion of both the Seventh and Eighth Circuit Courts of Appeal. In *Rowley* this Court also emphasized the fact that § 1415 of the EAHCA was entitled "Procedural Safeguards" and that an action under subsection (e)(2) thereof was one of judicial review of administrative proceedings.

> "Therefore, a court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." *Id.* at 4933.

The Eighth and Seventh Circuit Courts of Appeal likewise concluded that the legislative history of the EAHCA was silent on whether damages were authorized, and that portions of the legislative history lead to the conclusion that a monetary remedy would be in conflict with

the major concerns which Congress was attempting to address. For instance, sponsors of the legislation recognized that there is a great deal of uncertainty in the area of education of the handicapped. The Seventh Circuit pointed out that it would be totally incongruous for Congress to subject school districts to damage liability whenever a court subsequently disagreed with the educational program which they were providing. *Anderson* v. *Thompson, supra,* at 1212. The Seventh Circuit also noted that Congress was concerned about the lack of money available for education of the handicapped and the EAHCA was created to provide additional funding. However, it would be totally inconsistent to divert funds away from the general effort of education of the handicapped by the imposition of monetary damages. Finally, the Seventh Circuit noted that Congress realized that services to all handicapped children could not be provided immediately. A recognition, however, that improvement in the educational program for the handicapped could only take place over a period of years is inconsistent with an intent to impose an immediate monetary remedy for failure to provide services. *Anderson* v. *Thompson, supra,* at 212-213. Finally, the court noted that the field of special education is in a state of flux and that disagreements will almost certainly arise. The Court concluded that potential liability for monetary relief would discourage innovation and reform in the field. This, however, would run counter to the interests of the group which the statute was designed to benefit. *Id.,* at 1213.

In summary, respondents believe that both the Court of Appeals below as well as the Seventh Circuit Court of Appeals were correct in their conclusion that monetary damages are not available under the EAHCA. The reasoning of both courts is generally consistent with this Court's

subsequent opinion in *Rowley*. Respondents believe that not only because of the correctness of the opinion below but because of its consistency with this Court's views on the EAHCA, there is no need for this Court to grant certiorari in this case.

Petitioner urges as a reason for granting the writ that there is a conflict between the Seventh and Eighth Circuit Courts of Appeal. The respondents believe that the petitioner is essentially attempting to manufacture a conflict which does not exist under the facts of this case. It is true that the Eighth Circuit Court of Appeals did not agree with the Seventh Circuit's recognition of two exceptional circumstances in which limited damages might be available. *Miener* v. *State of Missouri, supra,* at 980. However, the relief which the Seventh Circuit recognized would not even apply to the petitioner's situation. The Seventh Circuit recognized that in two situations parents could provide necessary alternative services to their children without awaiting the outcome of the administrative and judicial proceedings and could then be compensated for the costs of obtaining those services. However, the court cautioned:

> "Parents' costs of obtaining services that the school district was required to provide are the only appropriate money damages in these exceptional circumstances. In no event can we imagine that tort liability damages were intended." *Anderson* v. *Thompson, supra,* at 1213, n. 12.

The petitioner's claim for money damages, however, was not directed to reimbursement of costs, since the petitioner's parents never undertook to secure alternative services for the petitioner. There was simply nothing to reimburse. Rather, the petitioner's claim for over $500,000 in damages

is simply a general tort liability which the Seventh Circuit refused to acknowledge. In short, the dismissal of plaintiff's complaint would have been upheld by the Seventh Circuit just as much as the Eighth Circuit.

Further, the Eighth Circuit Court of Appeals concluded that the petitioner's complaint did not fall within the exceptions recognized by the Seventh Circuit, in any event. *Miener* v. *State of Missouri, supra,* at 980. Respondents believe that the Eighth Circuit was clearly correct in this assessment of the petitioner's claim. The first exceptional circumstance recognized by the Seventh Circuit was a situation in which a child's physical health is endangered. The court indicated that parents may make alternative arrangements and subsequently receive reimbursement if it is determined that a school district should have provided those services. Petitioner alleged in her petition that paragraphs 53, 56 and 57 of her complaint fall within this exception. These paragraphs generally allege the failure of the St. Louis State Hospital officials and staff to provide a secure and safe environment. However, as paragraph 23 of plaintiff's complaint recognizes, she was a voluntary patient at the state hospital. The petitioner's residence at a mental health facility was not the result of an educational placement. The petitioner could have left the state hospital at any time. If she had, alternative arrangements for her education would have to have been devised. Depending upon where her new residence was and depending upon what her educational diagnosis was, either a local school district or the State of Missouri would have had to undertake her education. Respondents believe, however, that this is clearly not the sort of circumstance which was contemplated by the Seventh Circuit when they recognized a limited right of action for damages.

The second exceptional circumstance, authorizing limited damages, recognized by the Seventh Circuit, was a situation in which a defendant had acted in bad faith by failing to comply with the procedural provisions of § 1415 in an egregious fashion. *Anderson* v. *Thompson, supra,* at 1214. The petitioner attempts to argue that she falls within this exception as well and specifically refers to paragraphs 36 and 39 of her complaint. Paragraph 36 is an allegation in which the petitioner attempts to justify why she had not pursued her administrative remedies under § 1415. Petitioner alleged that it would be useless to pursue these procedures "in the face of the state's continual inaction." The inaction referred to, however, was not any failure of the respondents to comply with the procedural requirements of the EAHCA but simply the failure to agree with and provide the services requested by petitioner's parents. Similarly, paragraph 39 of the petitioner's complaint is an allegation that the respondent's refusal to allow the petitioner to participate fully in their programs was "discriminatory, arbitrary, capricious, unreasonable and without just cause". This again is not any bad faith procedural default by the respondents but simply a disagreement over the type of educational program which was appropriate for the petitioner. The Seventh Circuit, however, only recognized an exception in the event of a bad faith refusal to comply with the procedural protections. It should be noted that the District Court below specifically ordered the petitioner to exhaust her administrative remedies and that it was in the course of these administrative procedures that the petitioner's claim for injunctive relief was settled. In short, neither the type of relief sought nor the factual allegations of the complaint, would indicate that the petitioner falls within the limited exceptions recognized by the Seventh Circuit Court of Appeals. Therefore, the area in which the Eighth

and Seventh Circuit Courts of Appeals disagree has absolutely no bearing upon the issues in this case and does not justify review by this Court.

II.

The Court of Appeals correctly concluded that the petitioner's claim for compensatory educational services beyond age 21 constitutes a claim for damages which would be barred by the Eleventh Amendment to the United States Constitution.

In the third paragraph of the prayer for relief in her complaint, the petitioner requested that the Court require the respondents to provide "compensatory services to overcome the effects of any past denial of special educational services . . ." Although not explicitly stated therein, briefs submitted to the District Court made clear that the petitioner was requesting that the District Court require the state to provide educational services to the petitioner beyond age 21, which is the current limit of its obligation. Both the District Court and the Court of Appeals below concluded that this claim for relief was in actuality one for damages and, therefore, barred by the Eleventh Amendment to the United States Constitution.

While the dividing line between legal and equitable relief may not always be clear, the fact that the petitioner chooses to characterize this compensatory education as prospective is clearly not controlling In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), this Court rejected a lower court's characterization of monetary relief as "equitable restitution". This Court indicated that the nature of the relief is controlling, rather than how a party or court characterizes it. This Court held that the restitution which had been ordered in *Edelman* was indistinguishable from an award of money damages against the state because it was "mean-

ured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Id.* at 668.

Similarly, the compensatory education requested by the petitioner would have to be provided either by the state directly or a payment of costs to another provider. In either event though it would impact upon the state treasury. This impact alone would not be sufficient to invoke the Eleventh Amendment. However, the compensation which the petitioner claims would have to be measured against an alleged past deprivation of her rights. This renders the claim clearly one for compensation rather than prospective relief. This relief would not be necessary to ensure that the respondents provided the petitioner an appropriate education in the future. A prospective decree does not depend upon the *extent* to which a plaintiff's rights have been deprived in the past. Rather, it depends only on whether they have in fact been deprived and a determination as to what a plaintiff is entitled. The petitioner's claim for compensatory education, however, is inextricably linked to an assessment of the degree to which her rights were allegedly violated in the past because only in this way could a court determine how much of a compensation the respondents would be required to undertake.

If the petitioner's theory of legal and equitable relief were adopted, many traditional damage claims would be magically transformed into equitable actions. Many items of damage in a traditional personal injury case are based upon quantification in monetary term of services which it is expected the plaintiff will have to receive in the future. If a court were to order a defendant to provide the services (medical care, food, clothing, and shelter) in kind, rather than a lump sum damage award, respondents believe that it would still constitute a damage award. The

duty to provide these services would still be dependent upon the defendant's past conduct and would not be designed to ensure appropriate conduct in the future.

Petitioner argues, however, that the relief she seeks is indistinguishable from that which this Court approved in *Milliken* v. *Bradley*, 433 U.S. 267 (1977). In *Milliken* this Court held that a decree requiring remedial educational programs in the area of reading and speaking as part of a desegregation decree was not barred by the Eleventh Amendment. *Id.* at 290. However, this Court indicated that these remedial programs were intimately linked to the effective implementation of the desegregation decree itself and were designed to assure the benefits of a unitary school system. In this context, the remedial programs approved by this Court were for the purpose of ensuring that in the future the educational opportunity offered to the plaintiffs was, in fact, equal. Petitioner's request for relief, however, was not tied in any way to what an appropriate education for her would be in the future. As noted earlier, this matter was settled by agreement of the parties. However, if it had not been, the District Court might well have concluded that some additional service, such as an occupational therapist, had to be provided to the petitioner. If the District Court had entered such an order, it would clearly have an impact upon the state treasury but would not have been barred by the Eleventh Amendment since the provision of such an additional service would be clearly tied to a prospective determination of what constituted an appropriate education for the petitioner. However, as part of a determination of what constitutes an appropriate education, the District Court could not have ordered the respondents to provide educational services to petitioner beyond the age of 21. It should be noted that the decree upheld by this Court in *Milliken* did *not* provide for the

provision of educational services beyond the maximum age for public education in Michigan. This, however, is precisely the sort of relief which was sought by the petitioner in her claim for compensatory education. This is an essential difference between the relief sought by petitioner and that approved by this Court in *Milliken*. The Court of Appeals was clearly correct in its conclusion that the petitioner's claim for compensatory education was, in fact, one for damages and, therefore, barred by the Eleventh Amendment and there is no need for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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